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No.

Supreme Court, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD HIDALGO, SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the plaintiff in an action against the United States under Section 15(c) of the Age Discrimination in Employment Act, 29 U.S.C. 633a(c), is entitled to trial by jury.

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The Solicitor General, on behalf of Edward Hidalgo, Secretary of the Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-26a) is not yet reported. The opinion of the district court (App. B, *infra*, 27a–32a) and supplemental opinion of the district court (App. C, *infra*, 33a–35a) are reported at 481 F. Supp. 159.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 36a–37a) was entered on February 19, 1980, and the petition for rehearing was denied on May 5, 1980 (App. E, *infra*, 38a–40a). On July 29, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to August 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in Appendix F, *infra*, 41a–45a.

STATEMENT

1. Respondent brought this action in the United States District Court for the District of Columbia against the Secretary of the Navy alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* She demanded a jury trial, and the government moved to strike that demand (App. A, *infra*, 2a–3a). The district court denied the motion to strike (Apps. B and C,

infra, 27a–35a) but certified for interlocutory appeal under 28 U.S.C. 1292(b) the question whether a jury trial is available in an ADEA action against the federal government (App. A, *infra*, 2a). The court of appeals granted the government's petition for interlocutory review (*ibid.*).

2. A divided panel of the court of appeals affirmed (App. A, *infra*, 1a–26a). The majority noted that there is no constitutional basis for jury trials because "the Seventh Amendment does not apply to suits against the government" (App. A, *infra*, 5a) and also acknowledged the "absence of explicit statutory authorization" for jury trials in federal sector ADEA cases (*id.* at 10a). But the court nevertheless found "enough evidence to support an inference that Congress intended to provide for jury trials" in such cases (*ibid.*). It relied on two factors.

First, the court of appeals found that "the very fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims supports the inference that there is a right to jury trial in such cases" (App. A, *infra*, 10a). Second, the court found this inference to be "strengthened" by Congress' authorization in Section 15(c) of the Act, 29 U.S.C. 633a(c), for the award of "*legal* and equitable relief" against the government (App. A, *infra*, 11a; emphasis supplied by the court). The court noted that, in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), this Court had relied in part upon the authorization for the award of "legal" relief under Section 7(c) of the ADEA (29 U.S.C. (Supp. II) 626(c)), in concluding that Congress intended to confer a statutory right to a jury trial in an ADEA action against a private employer under that section, and it reasoned that Congress must be assumed to have conferred the same right in suits against the federal government because it also used the word "legal" in Section 15(c).

Judge Tamm dissented (App. A, *infra*, 15a–26a). He observed that the legislative history of the Fair Labor Standards Act Amendments of 1974, in which Congress enacted the present Section 15 of the ADEA to provide protection against age discrimination for federal employees,[1] "does not mention the issue of jury trials under section [15]" (App. A, *infra*, 19a). Judge Tamm also noted that when Congress amended Section 7(c) of the Act in 1978 to provide for the right to jury trial in cases brought against private employers (and state and local governments), it did not amend Section 15(c) to provide for jury trials in cases brought against the federal government (App. A, *infra*, 21a–22a). In Judge Tamm's view, moreover, Congress' decision to extend protection against age discrimination to federal employees "does not necessarily mean Congress intended to establish the same procedures for federal employees to enforce those protections" as were then available to employees in the private sector (*id.* at 20a).

Finally, Judge Tamm found the majority's reliance on *Lorillard* misplaced, because the allowance of jury trials against the federal government raises "different concerns" than do jury trials involving private employers. By the same token, Judge Tamm concluded that the majority erred in focusing on Congress' use of the phrase "legal * * * relief" in Section 15(c), because the Court in *Lorillard* found that to be a term of art relevant only in determining when the Seventh Amendment right to a jury trial attaches in suits between private parties.[2]

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[1] Section 15 of the ADEA was added by Section 28(b)(2) of the Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93–259, 88 Stat. 55.

[2] The government's petition for rehearing and suggestion for rehearing en banc were denied, with four judges dissenting (Apps. E and F, *infra*, 38a–40a).

REASONS FOR GRANTING THE PETITION

It is well settled that the Seventh Amendment right to trial by jury in cases at common law does not extend to actions against the federal government, because suits against the sovereign were unknown at common law and were therefore not among the category of cases for which the right to jury trial was "preserved" upon adoption of the Seventh Amendment. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (Harlan, J.); *Galloway* v. *United States*, 319 U.S. 372, 388–389 (1943); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). Accordingly, there is no right to trial by jury in actions against the government unless "Congress, in the legislation cited, has made it applicable." *Galloway* v. *United States*, *supra*, 319 U.S. at 389.

In the present case, the court of appeals found a right to trial by jury in ADEA cases against the government despite (i) the lack of explicit statutory authorization for such trials, (ii) the failure of Congress to amend Section 15(c) in 1978 expressly to provide for jury trials in cases against the federal government, even though it amended Section 7(c) at that time to provide for such trials in other ADEA cases, and (iii) the total absence of any indication in the legislative history of the 1974 and 1978 amendments to the ADEA of a congressional intent to confer such a right. The court of appeals relied solely on the fact that Congress had granted jurisdiction over federal sector ADEA cases to the district courts, rather than the Court of Claims, and had authorized the courts to award "legal" relief. But there is no reason to believe that either provision was intended to imply anything in regard to jury trials.

The result below will lead to widespread demands for jury trials in ADEA cases in the District of Columbia, where many federal employees work, and elsewhere.

Moreover, the ease with which the court of appeals inferred a right to a jury trial against the federal government in the absence of any evidence of congressional intent may lead to similar results under many other statutes in which Congress has conferred jurisdiction on the district courts and has authorized the award of what could be characterized as "legal" relief against the government. Review by this Court therefore is warranted.

1. The court of appeals plainly erred in inferring an intent to grant a statutory right to trial by jury from the fact that Congress authorized the district courts to award "legal" as well as "equitable" relief in actions brought against the federal government under Section 15(c) of the ADEA. This Court's decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), relied upon by the court of appeals (App. A, *infra*, 11a), does not support such an inference.

Lorillard involved an action brought against a private employer under Section 7(c) of the ADEA. The plaintiff argued that the Seventh Amendment guarantees a right to trial by jury in a private action for lost wages under that section or, alternatively, that the ADEA itself grants such a right. The Court decided the case on statutory grounds, finding that "'a construction of the statute is fairly possible by which the [constitutional] question may be avoided'" (434 U.S. at 577, quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

In construing the statute to avoid a constitutional question under the Seventh Amendment, the Court found it significant that Section 7(b) of the Act authorizes a district court to grant "*legal* or equitable relief" and Section 7(c) authorizes employees to bring actions for "*legal* or equitable relief" (434 U.S. at 583; emphasis supplied by the Court). The Court viewed the word "legal" as a term of art in this context, because "[i]n cases in which legal relief

is available and legal rights are determined, the Seventh Amendment provides a right to jury trial" (*ibid.*, citing *Curtis* v. *Loether*, 415 U.S. 189, 195–196 (1974)). Because the word carried an established implication with respect to the availability of jury trials under the Seventh Amendment, the Court could infer that "Congress knew the significance of the term 'legal,' and intended that there would be a jury trial on demand" (434 U.S. at 583).

Sections 7(b) and (c) of the ADEA, involved in *Lorillard*, have no application to actions brought against the federal government. The present case arises under Section 15(c), which was added to the ADEA in 1974 to establish wholly separate substantive and procedural provisions governing age discrimination in federal employment.[3] The separate nature of Section 15 was made explicit by the addition thereto in 1978 of subsection (f), which provides that personnel actions in the federal government shall not be "subject to, or affected by" any other provisions of the Act.[4] See H.R. Rep. No. 95–527, 95th Cong., 1st Sess. 11 (1977) ("Section 15 * * * is complete in itself"); H.R. Conf. Rep. No. 95–950, 95th Cong., 2d Sess. 11 (1978) (Sec-

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[3] Thus, Section 15(a) states a separate substantive prohibition against age discrimination in the federal government; federal employees were not brought under the substantive prohibitions against age discrimination in Section 4 of the Act, 29 U.S.C. (and Supp. II) 623, applicable to employees in the private sector and state and local government. See Section 11(b) of the Act, 29 U.S.C. 630(b). Moreover, administrative and enforcement responsibility under Section 15(b) was vested in the Civil Service Commission, not the Secretary of Labor, who had responsibility in the private sector under Sections 3–13 of the Act, 29 U.S.C. 622–632. See App. A, *infra*, 20a–21a & n.6 (Tamm, J., dissenting).

[4] Section 15(f) contains but one exception to this rule: federal personnel actions are subject to Section 12(b) of the Act, 29 U.S.C. (Supp. II) 631(b), which provides that the prohibitions in Section 15 are limited to persons over age 40, without the upper age limitation of 70 applicable in the private sector and state and local government. See 29 U.S.C. (Supp. II) 631(a).

tion 15 "is independent of any other section of the act, except section 12(b) which contains the age limitation for federal employees" (see note 4, *supra*)).

There is no occasion to construe Section 15(c) in any particular way in order to avoid a constitutional question, because the Seventh Amendment does not apply to suits against the federal government. Nor, for the same reason, can the word "legal" be deemed a term of art as respects the availability of jury trials in cases involving the federal government. Congress therefore cannot be thought to have attached any particular significance to the term when it enacted a separate section of the ADEA dealing with federal employment in 1974, and it would be improper to infer an intent to confer a right to jury trial from the use of the word in Section 15(c).[5]

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[5]The other basis for the Court's holding in *Lorillard* likewise has no application to suits against the federal government under Section 15(c). The Court found it significant in *Lorillard* that Section 7(b) states that the ADEA is to be enforced "in accordance with the powers, remedies, and *procedures*" provided in certain sections of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* (434 U.S. at 580–581; emphasis supplied by the Court). The Court noted that it was well established prior to enactment of the ADEA in 1967 that there was a right to a jury trial in private actions pursuant to the FLSA, and the Court held that Congress, in incorporating FLSA procedures, must therefore be presumed to have intended the jury trial right to apply under the ADEA (434 U.S. at 580–581).

In amending the ADEA to furnish protection against age discrimination for federal employees, however, Congress departed from the FLSA model it had adopted for suits against private employers and chose instead to pattern Section 15 after Section 717(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a) and (b), which also bars discrimination in federal employment. The language in Sections 15(a) and (b) of the ADEA is substantially similar to that of Sections 717(a) and (b) of the Civil Rights Act, and Senator Bentsen, the principal sponsor of the present Section 15 of the ADEA, explained that "[t]he measures used to protect federal employees [from age discrimination] would be substantially similar to those incorporated" in Title VII. 118 Cong. Rec. 24397 (1972). Although this Court has not

2. The court of appeals also erred in concluding that an affirmative congressional intent to provide for jury trials in ADEA cases against the federal government could be inferred from the fact that Congress had vested jurisdiction over such cases in the district court, not the Court of Claims. The court of appeals cited nothing in the legislative history to support this inference, and we have found nothing in the hearings, floor debates, or committee reports. The more likely explanation for this grant of jurisdiction—if it is necessary to look for one—is that the district courts are accustomed to awarding equitable relief of the type authorized under Section 15(c), but the Court of Claims is not. See *United States* v. *King*, 395 U.S. 1, 3 (1969).[6] Rule 38(a) of the Federal Rules of Civil Procedure

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yet decided the question, the lower courts are unanimous that there is no right to a jury trial under Title VII, even in an action against a private employer. *Great American Fed. Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375 (1979); *Lorillard* v. *Pons*, *supra*, 434 U.S. at 583–584; *Curtis* v. *Loether*, *supra*, 415 U.S. at 196–197 & n.13; see also *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978). (collecting cases). Accordingly, there is no reason to believe that Congress, when it patterned Section 15 after Section 717 of the Civil Rights Act, intended to confer a statutory right to a jury trial. See also 29 U.S.C. (Supp. II) 633a(f).

In any event, there would be no statutory right to jury trial under Section 15(c) even if that section were thought to be analogous to the FLSA. The lower court cases cited by the Court in *Lorillard* as recognizing a right to jury trial in FLSA actions all appear to have rested on the Seventh Amendment, not the FLSA itself. *Wirtz* v. *Jones*, 340 F.2d 901, 903–904 (5th Cir. 1965); *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950); *Olearchick* v. *American Steel Foundries*, 73 F. Supp. 273, 277–279 (W.D. Pa. 1947). These cases thus do not suggest that there is a statutory right to a jury trial against the federal government under the FLSA or, by analogy, under the ADEA.

[6] Distributing these cases among the district courts also avoids the substantial increase in the docket of the Court of Claims that would result if all federal sector ADEA cases were concentrated there, and provides a more convenient forum for plaintiffs. In addition, vesting jurisdiction over federal ADEA cases in the district courts is consist-

provides that the right to trial by jury "as declared by the Seventh Amendment to the Constitution or *as given by a statute of the United States* shall be preserved to the parties inviolate" (emphasis added). This language certainly does not state a general rule or presumption that jury trials are available whenever Congress confers jurisdiction on the district courts. To the contrary, it is still necessary to look elsewhere for a specific, affirmative grant of a right to jury trial where, as here, the Seventh Amendment does not apply.

In attaching significance to the jurisdictional grant, the court of appeals placed substantial reliance on *United States* v. *Pfitsch*, 256 U.S. 547 (1921). That case concerned whether jurisdiction granted to the district courts by Section 10 of the Lever Act (ch. 53, 40 Stat. 279) over actions brought to recover just compensation for certain war supplies requisitioned by the federal government was under the Tucker Act or under the ordinary jurisdiction of the district court. The issue was raised because it affected the manner of appellate review (256 U.S. at 549). But the Court observed that its decision would also incidentally affect the right to a jury trial, because there was no such right under the Tucker Act but there was one under "the law governing the usual procedure of a District Court in actions at law for money compensation" (*id.* at 550). The Court noted that Congress had considered and rejected a proposal to confer Tucker Act jurisdiction under Section 10 (*id.* at 550–551). Thus, in the Court's view, "Congress had this question presented to its attention in a most precise form," and it was "difficult to conceive of any rational ground for rejecting the clear and explicit amendment

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ent with Congress' similar grant of jurisdiction under Section 717(c) of the Civil Rights Act of 1964 with respect to claims against the federal government, which, as we have pointed out (see note 5, *supra*), does not carry with it a right to jury trial.

made by the Senate except to accord a trial by jury" (*id.* at 552).

In the present case, in contrast, Congress did not consider either the possibility of conferring jurisdiction over federal sector ADEA claims on the Court of Claims rather than the district courts or the wisdom of authorizing jury trials in such cases. Moreover, one can readily "conceive of [a] rational ground" for conferring jurisdiction on district courts in ADEA cases other than to confer a right to a jury trial. The statute here, unlike in *Pfitsch*, authorizes equitable relief, not merely the award of a money judgment that could be made as readily by the Court of Claims.

The court of appeals' reliance on *Pfitsch* was misplaced for another reason as well. When *Pfitsch* was decided, Section 566 of the Revised Statutes (later codified at 28 U.S.C. (1925 ed.) 770) provided: "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." See also Rev. Stat. 648.[7] Because *Pfitsch* was an action at law, it was within the reach of the statutory jury trial guarantee in Rev. Stat. 566 and could be excepted only if it fell under the Tucker Act's express provision for trial without a jury. When the Court concluded that jurisdiction was not invoked under the Tucker Act, it necessarily followed that the jury trial right in Rev. Stat. 566 attached.

The Revision Act of 1948, however, repealed the pertinent portion of 28 U.S.C. (1925 ed.) 770. Ch. 646, Section 39, 62 Stat. 992. As a result, there is no longer any generally applicable statutory right to jury trial in federal dis-

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[7] These provisions were derived from Sections 9 and 12 of the Judiciary Act of 1789, ch. 20, 1 Stat. 76, 79. See generally 5 *Moore's Federal Practice* ¶ 38.08[5], at 71-73 (2d ed. 1979).

trict court as there was when *Pfitsch* was decided. Compare *Pernell* v. *Southall Realty*, 416 U.S. 363, 365–366 (1974). It is therefore necessary to look either to the Seventh Amendment (which does not apply in the present case) or to the governing statute to find an affirmative grant of that right. As we have explained, the governing statutory provision here, Section 15(c) of the ADEA, does not confer a right to jury trial.[8]

3. In *Lorillard*, the Court was able to rely on certain features of Section 7(c) of the ADEA that made it "fairly possible" to construe that section to confer a right to a jury trial (and thereby to avoid the Seventh Amendment question), even in the absence of any firm indication of a deliberate congressional decision to provide such a right.

In a case such as *Lorillard*, it may be appropriate to indulge the presumption that Congress would not intend a grudging availability of jury trials in the types of private causes of action to which the Seventh Amendment generally applies, and that Congress itself is fully prepared to recognize a right to trial by jury wherever the particular cause of action would arguably fall within the ambit of the Seventh Amendment guarantee.

Section 15(c), however, cannot be construed by application of a canon of construction designed to avoid constitutional questions or by resort to a presumption that Congress is prepared to recognize a right to jury trial against the federal government wherever a Seventh Amendment question might be raised in a comparable suit against a private party. To the contrary, the experience where

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[8]The court of appeals also relied (App. A, *infra*, 11a) upon *Law* v. *United States*, 266 U.S. 494 (1925), in attaching significance to the grant of jurisdiction to district courts. But *Law* merely cites *Pfitsch*, adding nothing to the analysis (266 U.S. at 496). The discussion of the jury trial right in that case was dictum in any event because the dis-

Congress has waived the sovereign immunity of the United States to allow suits against the government has been that jury trials ordinarily are *not* available.[9] In claims for money damages sounding in tort or contract, for example—the very types of actions at law in which the Seventh Amendment would guarantee a right to jury trial in a case involving private parties—28 U.S.C. 2402 expressly provides that trial in the district court shall be without a jury. And jury trials historically have not been available in actions for a money judgment brought in the Court of Claims. See, *e.g.*, *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 572.

Against this background, the courts must assume that Congress does not intend to permit jury trials when it authorizes actions against the United States, unless Congress affirmatively and expressly so provides. See 28 U.S.C. 2402 (jury trials available in tax refund suit under 28 U.S.C. 1346(a)(1)); cf. *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op. 3 (waiver of sovereign immunity cannot be implied, but must be "unequivocally expressed").[10] The court of appeals' decision, which in ef-

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trict court had granted the government's motion to strike the jury trial demand, and the Court reversed for reinstatement of the district court's judgment against the government sitting without a jury. At the time *Law* was decided, moreover, 28 U.S.C. (1925 ed.) 770 furnished a statutory right to jury trial in such cases.

[9] When Congress waives the government's sovereign immunity, the terms of its consent to suit define the court's jurisdiction to hear the case. *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op. 3. Thus, the question in the present case is not what construction of the statute is "fairly possible," but what terms of suit Congress affirmatively authorized.

[10] Indeed, not only is there no evidence of an affirmative congressional intent to provide jury trials in federal sector ADEA cases, the record reflects a contrary determination. In 1978, when Congress amended Section 7(c) and codified the result in *Lorillard* by providing for jury trials in ADEA suits against private employers (and state and local governments) (see 29 U.S.C. (Supp. II) 626(c)(2), as added by

fect creates a presumption *in favor* of jury trials in suits against the government (see App. A, *infra*, 9a n.4), represents a marked departure from these principles.

4. The court of appeals' holding in this case, if allowed to stand, will result in a demand for jury trials in many ADEA cases in the District of Columbia, where a large number of federal employees work,[11] and will surely be relied upon by plaintiffs in federal sector ADEA cases elsewhere. Moreover, some plaintiffs in Title VII cases also include ADEA claims in their complaints, and more may do so in order to take advantage of a right to jury trial under the ADEA. Cf. *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959).[12] Jury trials in ADEA cases generally would increase the time and expense of litigating these cases and would add to the congestion in the courts. In addition, as Judge Tamm noted, jury trials might lead to damage awards that are "overly generous because of the virtually unlimited ability of the Government to pay the verdict" (App. A, *infra*, 23a, quoting H.R. Rep. No. 659, 83d Cong., 2d Sess. 3 (1954)).

Pub. L. No. 95-256, Section 4(a), 92 Stat. 191), it could easily have amended Section 15(c) to provide for jury trials in age discrimination cases against the federal government as well. Congress' failure to do so, even though it amended Section 15 in other respects, serves to confirm that jury trials are not available in such cases. See App. A, *infra*, 21a-22a (Tamm, J., dissenting).

[11] We have been informed by the Office of the United States Attorney for the District of Columbia that jury trials have been demanded in 16 ADEA cases against the government now pending in the District of Columbia.

[12] We have been informed by the Office of the United States Attorney for the District of Columbia that there are 23 Title VII cases pending in the District of Columbia in which an ADEA claim has also been included in the complaint.

The court of appeals' ruling may also lead to the inferring of a right to trial by jury in actions under other statutes brought against the United States in the District of Columbia merely because Congress has conferred jurisdiction on the district court and authorized the award of what could be characterized as "legal" relief. Thus, for example, the District Court for the District of Columbia, relying on the court of appeals' decision in this case, has recently held that a plaintiff is entitled to trial by jury in an action alleging breach of a collective bargaining agreement filed against the United States Postal Service under 39 U.S.C. 1208(b). See *Johnson* v. *American Postal Workers Union and United States Postal Service*, Civ. No. 78–1853 (D.D.C. Apr. 24, 1980). The litigation workload of the District Court for the District of Columbia, which hears a high percentage of suits against the government, will increase considerably if jury trials are made available in the many areas in which innovative plaintiffs might seek them. See, *e.g.*, 5 U.S.C. 552(g)(4)(A) (action for actual damages sustained from intentional or willful violation of Privacy Act);[13] 29 U.S.C. 216(b) (action for wages and liquidated damages under the FLSA); 39 U.S.C. 409 (actions against the United States Postal Service, including, *e.g.*, damages for breach of lease).[14] The standards for determining the availability of jury trials in actions against the government, under the ADEA and generally, therefore warrant this Court's attention.

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[13]Cf. *Parks* v. *United States Internal Revenue Service*, No. 78–1518 (10th Cir. Mar. 27, 1980) (action will lie under Privacy Act for damages resulting from mental distress or embarrassment).

[14]See *Silverman* v. *United States Postal Service*, Civ. No. 79–384 (E.D. Pa. Jan. 3, 1980) (denial of motion for jury trial), appeal pending, No. 80–1441 (3d Cir.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1980

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1672

ALICE NAKSHIAN

v.

W. GRAHAM CLAYTOR, in His Official Capacity as Secretary of the Navy, *et al.*, APPELLANTS

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 78-0867)

Argued September 28, 1979

Decided February 19, 1980

Judgment entered this date

Michael Jay Singer, Attorney, Department of Justice, with whom *Carl S. Rauh*, United States Attorney at the time the briefs were filed, and *Robert E. Kopp*, Attorney, Department of Justice, were on the brief, for appellants.

Terry Coleman for appellee. *Patricia J. Barry* also entered an appearance for appellee.

Before WRIGHT, *Chief Judge*, BAZELON, *Senior Circuit Judge*, and TAMM, *Circuit Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* TAMM.

WRIGHT, *Chief Judge*: This interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) (1976),[1] is from a District Court order denying the Government's motion to strike the plaintiff's request for a jury trial in her action against the Secretary of the Navy for alleged violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1976), as amended by Pub. L. No. 95-256, 95th Cong., 2d Sess. (April 6, 1978), 92 STAT. 189-193. It raises questions concerning the right to a jury trial in an ADEA action against the federal government. District Judge Oberdorfer certified the issue for interlocutory appeal, and we granted the Government's petition for interlocutory review.

I

Appellee was a 62-year-old civilian employee of the United States Department of the Navy at the time she brought this action in the District Court under Section 15(c) of the ADEA, 29 U.S.C. § 633a(c) (1976),[2] against the Navy for alleged age discrimination in violation of

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[1] Under 28 U.S.C. § 1292(b) (1976) a District Court may certify, and the Court of Appeals may thereupon permit, appeals from interlocutory orders which involve "a controlling question of law as to which there is substantial ground for difference of opinion" and immediate review of which "may materially advance the ultimate termination of the litigation."

[2] That section provides:

> Any person aggrieved [by age-based discrimination] may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

the ADEA. She requested a jury trial. The Government moved to strike the request on the grounds that Congress, in authorizing ADEA actions against the federal government, did not specifically authorize jury trials and, therefore, that jury trials are barred by the doctrine of sovereign immunity.

The District Court denied the Government's motion, suggesting in its memorandum opinion that this result followed from the Supreme Court's decision in *Lorillard v. Pons*, 434 U.S. 575 (1978). In that case the Supreme Court held that there is a right to jury trial in an ADEA suit brought against private employers pursuant to Section 7(c), 29 U.S.C. § 626(c) (1976), of the Act. The Supreme Court noted that Congress had expressly provided that the enforcement of the ADEA would be in accordance with the "powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1976), and it has long been settled that there is a right to a jury trial in actions brought against private employers under the FLSA. The Supreme Court inferred from this that Congress must have intended to provide for a similar jury trial right in actions brought against private employers under the ADEA. In addition, the Court found the use of the term of art "legal * * * relief" in the wording of the statute significant. In the Court's view it provided further evidence of Congress' intention to provide for jury trials since it is settled that in cases in which legal relief is available and legal rights are determined the Seventh Amendment guarantees the right to jury trial.

The District Court pointed out that the same "legal * * * relief" language that the Supreme Court found significant in *Lorillard* is used in Section 15(c) of the Act, 29 U.S.C. § 633a(c) (1976), which authorizes suits against the federal government. The court also noted that as originally enacted the ADEA did not apply to

the Government. In amending the Act in 1974 to make it applicable to the Government, Congress made few changes in the Act. Indeed, it used the exact same language in Section 15(c), 29 U.S.C. § 633a(c), as it had used in Section 7(c), 29 U.S.C. § 626(c). This, in the court's view, indicated that Congress intended suits against the Government to be on equal footing with suits against private employers. Finally, the court observed that if Congress had intended to preclude jury trials in ADEA suits against the federal government it would have done so.

II

The Government rejects the District Court's analysis. It argues that since the Seventh Amendment right to jury trial applies only to "suits at common law," and at common law suits against the Government were barred by the doctrine of sovereign immunity, the right to jury trial therefore does not apply to actions against the Government under Section 15(c) of the Act. It further notes that Congress may, in waiving the Government's sovereign immunity, dictate the particular terms and conditions under which a suit against it may be brought. From these premises the Government purports to draw the conclusion that the availability of jury trial in actions against the Government requires a specific statutory provision to that effect; that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). It then examines the language and legislative history of the ADEA for such an explicit grant of a right to jury trial and, not surprisingly, is unable to find any.

The Government also rejects the suggestion that the Supreme Court's reasoning in *Lorillard* supports the inference that there is a jury trial right in ADEA actions against the Government. It notes that the FLSA right to a jury trial on which the Court relied in *Lorillard* was

in fact based on the Seventh Amendment. Since the Seventh Amendment does not apply to suits against the Government, this supports the inference that there is no right to jury trial in ADEA actions against the Government. Similarly, it contends that the jury trial connotation of the term "legal * * * relief" derives from the Seventh Amendment and therefore cannot apply to actions against the Government. Finally, the Government maintains that Congress' response to the *Lorillard* decision supports its position. In 1978 Congress amended Section 7(c) by enacting language that expressly provides for jury trials in ADEA actions brought against private employers. Since no similar action was taken with respect to Section 15(c), the Government argues that Congress did not intend to allow jury trials in ADEA actions against the federal government.

Appellee does not dispute the Government's claim that the Seventh Amendment guarantee of jury trial does not apply to actions against the Government, or the claim that Congress may prescribe the procedure to be followed in a suit when it waives the Government's sovereign immunity. She does, however, reject the Government's claim that there is a right to sovereign immunity from jury trial which may be inferred from these two premises. In her view the Government confuses the well established principle of sovereign immunity from suits without its consent with an unrecognized principle of sovereign immunity from jury trials. Appellee argues that there is no automatic presumption against jury trial in actions against the Government and no unequivocal grant of a right to jury trial need be found. Rather, the issue is an ordinary one of statutory interpretation—whether or not Congress intended that employees who bring ADEA actions against the Government should have a right to jury trial. To support her claim that Congress intended to grant a right to jury trial in ADEA actions against the Government, appellee looks to the language and legislative history of the ADEA.

She notes that, as originally enacted, neither the FLSA nor the ADEA applied to the Government. In 1974 Congress simultaneously amended both statutes to extend their coverage to federal employees. It amended the definition of "employee" in Section 3(e) of the FLSA, 29 U.S.C. § 203(e) (1976), to include federal employees. In addition, Section 16(b) of the FLSA, 29 U.S.C. § 216 (b) (1976), which creates a private right of action for unpaid wages and liquidated damages, was revised to provide that "[a]ction to recover such liability may be maintained against *any employer (including a public agency)* in any Federal or State court of competent jurisdiction * * *." (Emphasis added.) Appellee maintains that the manner in which federal employees were brought under the FLSA makes it clear that Congress wanted the same procedures to apply to their lawsuits as had previously been applied in suits against private employers. Appellee concludes that federal employees have a right to jury trial in FLSA suits against the Government, and points out that the court so held in *Carter v. Marshall*, Civil Action No. 77-165 (D. D.C. April 20, 1978).

Appellee argues that given this, the result in the instant case flows ineluctably from the *Lorillard* decision. *Lorillard* held that Congress intended that the ADEA be enforced in accordance with the procedures of the FLSA. Since, as just shown, Congress intended to grant a right to jury trial in all FLSA actions, including those brought by federal employees, we must presume that Congress intended to grant a similar right in ADEA actions against the federal government. Appellee notes that Congress viewed the application of the ADEA to the federal government as a "logical extension of the * * * decision to extend FLSA coverage to Federal * * * employees." S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974). Moreover, the original exclusion of federal employees from the coverage of the ADEA was an over-

sight which was due to the fact that in 1967 when the ADEA was enacted most Government employees were not covered by the FLSA. *Id.* This close linkage between the FLSA and the ADEA, appellee maintains, supports the inference that Congress wanted FLSA procedures, including the right to jury trial, to apply in ADEA actions against the Government.

Appellee also finds support for her position in the language of the ADEA. *Lorillard* relied in part on Section 7(b) of the Act, 29 U.S.C. § 626(b), which states:

> The provisions *of this chapter* shall be enforced in accordance with the powers, remedies, and procedures of [the FLSA]. * * *

(Emphasis added.) By referring to the *entire chapter*, Section 7(b) explicitly applies to actions brought under Section 15 of the Act, 29 U.S.C. § 633a. When Congress added Section 15 to the Act in 1974 it would have amended Section 7(b) if it did not want FLSA procedures to apply in actions against the Government. Since it did not, it must be assumed that Congress' intention was that FLSA procedures, including the right to jury trial, should apply in ADEA actions.

Furthermore, appellee notes that the same term of art "legal * * * relief" that the Supreme Court found significant in *Lorillard* appears in Section 15(c) of the ADEA, 29 U.S.C. § 633a(c), and therefore gives rise to the same jury trial inference that the Supreme Court drew in *Lorillard*. Appellee rejects the Government's attempt to distinguish *Lorillard* by arguing that the term was significant in that case only because of the Seventh Amendment. Appellee points out that *Lorillard* was not decided on the basis of the Seventh Amendment. Regardless of how the term "legal * * * relief" acquired its jury trial gloss, the holding in *Lorillard* was that its use implies that jury trial was intended.

Finally, appellee contends that the very fact that Congress vested jurisdiction in the District Court rather than the Court of Claims supports the inference of a right to jury trial.[3] She notes that the Supreme Court has intimated that when Congress confers jurisdiction over actions against the United States in the District Courts, it may be inferred that it intended to provide for jury trials. *United States v. Pfitsch*, 256 U.S. 547 (1921); *Law v. United States*, 266 U.S. 494 (1925). And Congress has shown that it is aware that a right to jury trial may be inferred when jurisdiction over actions against the United States is vested in the District Courts by expressly providing that there be no jury trial in most of these cases. *See* 28 U.S.C. § 2402 (1976) (providing that most actions under 28 U.S.C. § 1346 (1976) shall be tried by the court without a jury). The absence of any such provision in the ADEA is further indication that jury trial was intended.

III

The first issue that we must resolve is whether the Government is correct in arguing that there is a sovereign immunity from jury trial that can only be waived by explicit statutory language or legislative history.

In our view the Government's argument rests on a serious misconception. The doctrine of sovereign immunity bars suits against the Government without its consent. Congress can waive this immunity by authorizing such suits. In so doing it can specify the procedures to be followed, including whether the case is to be tried to a jury or to the court. In the absence of an explicit statutory provision, it is the task of the courts to deter-

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[3] It has long been settled that actions in the Court of Claims are tried without a jury. *See McElrath v. United States*, 102 U.S. (12 Otto) 426 (1880).

mine what type of trial—jury or court—Congress intended to authorize.[4]

By authorizing ADEA suits against the Government, Congress waived the Government's sovereign immunity, although it did not explicitly state what trial procedure is to be used in such cases. This does not, however, create an automatic presumption against jury trial in such cases. Rather, it presents us with an ordinary question of statutory interpretation—whether or not Congress intended that employees who bring ADEA actions against the Government should have a right to demand that the case be tried to a jury. Our task then is to see "if [the] statute, *expressly or by fair implication* so provides." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2314 at 69 (1971) (emphasis added; footnote omitted). *See also* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.31 [2] at 236 (2d ed. rev. 1979).

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[4] The Government and the dissent insist on an "express statement or * * * clear implication," dissenting opinion, —— F.2d at —— (p. 6), before they can find that there is a right to jury trial in an action against the Government. This view seems to be based on the supposition that there is a presumption against jury trial in actions against the Government even where sovereign immunity has been waived. The source of this supposition is not clear, but it appears to be connected with a misunderstanding of the doctrine of sovereign immunity. *See* dissenting opinion, —— F.2d at —— (pp. 11-12). Since sovereign immunity bars *all* actions against the Government—actions tried to the court as well as those tried to a jury—it is difficult to see why this doctrine should create a presumption against any particular method of trial. Indeed, if there are to be any presumptions, it would seem that the preference for jury trials in our jurisprudence would support a presumption in favor of such trials. In any event, once Congress has waived the Government's immunity, and where it has not explicitly specified the trial procedure to be followed, sovereign immunity drops out of the picture. Courts must then scrutinize the available indicia of legislative intent to see what trial procedure Congress authorized.

Courts can, and do, infer a congressional intention to allow jury trials in actions against the Government in the absence of explicit statutory authorization. For example, in *United States v. Pfitsch*, *supra*, 256 U.S. 547, the Supreme Court concluded that actions brought against the Government under the Lever Act of 1917, 40 STAT. 276 (1917), may be tried to a jury even though the statute did not provide for jury trials. Similarly, although the War Risk Insurance Act, 38 U.S.C. § 445 (1952) (now codified at 38 U.S.C. § 784 (1976)), did not, as originally enacted, provide for jury trials, it was construed by the Supreme Court to import "the usual procedure * * * in actions at law for money compensation," including trial by jury, in actions against the Government. *Law v. United States*, *supra*, 266 U.S. at 496; *accord*, *Galloway v. United States*, 319 U.S. 372, 389 n.18 (1943).

We therefore agree with the District Court that appellee may demand a jury trial for her suit if there is enough evidence to support an inference that Congress intended to provide for jury trials in ADEA actions against the Government. Our review of the statute and legislative history persuades us that Congress did so intend.

First, we agree with appellee that the very fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims supports the inference that there is a right to jury trial in such cases. As a leading authority has stated:

> Congress may confer jurisdiction of *actions against the United States* upon a district court sitting as a court of law (or equity), as a court of claims, and as a court of admiralty. And the particular grant of jurisdiction will determine the method of trial, court or jury, in the absence of some express pro-

> vision dealing with the method of trial. *Thus, absent a provision as to the method of trial, a grant of jurisdiction to a district court as a court of law carries with it a right of jury trial.* * * *

5 J. MOORE, *supra*, ¶ 38.32[2] at 236 (emphasis added; footnotes omitted); *accord*, 9 C. WRIGHT & A. MILLER, *supra*, § 2314 at 69 n.43. The Supreme Court's conclusions in *United States v. Pfitsch*, *supra*, and *Law v. United States*, *supra*, that actions against the Government could be tried to a jury were based on this reasoning.

Our belief that Congress intended to provide for jury trials is strengthened by Congress' choice of language in drafting the statutory provision. Congress used the term of art *"legal* and equitable relief" (emphasis added) in authorizing actions against the Government under Section 15(c), 29 U.S.C. § 633a(c), the same term it employed in authorizing actions against private employers under Section 7(c), 29 U.S.C. § 626(c). As appellee points out, the Supreme Court held in *Lorillard v. Pons*, *supra*, that the use of this term of art indicates an intention to provide for jury trials. To be sure, *Lorillard* involved a suit against a private employer. However, we must assume that Congress meant to confer the same rights when it used the same term in authorizing suits against the Government. Therefore, we may infer that, by authorizing "legal * * * relief" in ADEA actions against the Government, Congress was exercising its power to place such suits within the class of suits to which the Seventh Amendment jury trial guarantee applies. *Cf. Galloway v. United States*, *supra*, 319 U.S. at 388-389 ("Whatever force the [Seventh] Amendment has [in a suit against the Government] * * * is because Congress, in the legislation cited, has made it applicable.") (footnote omitted).[6]

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[6] Thus in our view the dissent misses the point when it suggests that the jury trial connotation of the term "legal

We are not persuaded by the claim by the Government (and the dissent) that the 1978 amendments to the ADEA show that Congress did not intend to allow jury trials in actions against the Government. Congress amended Section 7(c), 29 U.S.C. § 626(c), to expressly provide for jury trials in actions against private employers. Pub. L. No. 95-256 § 4, 92 STAT. 190, 95th Cong., 2d Sess. (April 6, 1978). The Government and the dissent suggest that if Congress had intended to allow jury trials against the Government, it would also have amended Section 15(c), 29 U.S.C. § 633a(c). However, the legislative history of the amendment and the context in which it was enacted demonstrate that Congress was merely acting to reaffirm its intention to provide for jury trial whenever the issue was in doubt.

The jury trial issue was raised on the floor of the Senate after the House had already passed the bill. Senator Kennedy offered the amendment on October 19, 1977 —before *Lorillard* was decided. He noted that three of the four circuits that had considered the issue had ruled in favor of jury trials, that the amendment would clarify the issue, and that jury trials were particularly appropriate in age discrimination cases.[6] The amendment

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* * * relief" is inapplicable in this case because the Seventh Amendment does not apply to suits against the Government. Dissenting opinion, —— F.2d at —— (p. 10). Congress undoubtedly can, and in this case did, authorize "legal relief" in actions against the United States.

[6] Senator Kennedy observed:

> [J]uries are more likely to be open to the issues which have been raised by the plaintiffs. Sometimes, a judge may be slightly callous, perhaps because he is protected by life tenure, or because he is somewhat removed from the

was immediately adopted without debate. The bill was reported by the Conference Committee shortly after *Lorillard* was decided. The Conference Committee adopted the Senate amendment, and indeed expanded the amendment to provide for jury trials in actions for liquidated damages, an issue that the Supreme Court had left open in *Lorillard*.[7]

Thus what we see is Congress reiterating its belief in the appropriateness of jury trials in ADEA actions and acting to confirm the right whenever doubt appeared—first when there was conflict among the circuits on the jury trial issue, and later to resolve the question left open by *Lorillard*. The legislative history of the amendment speaks only in terms of confirming the right to jury trials in age discrimination cases. No attempt was made to draw a distinction between public and private employers.[8] That only Section 7(c) was amended is easily explained by the fact that the cases which prompted congressional action were brought against private employers.

Our reading of the legislative history of the 1978 amendment is consonant with a statement placed in the Congressional Record on September 5, 1979 by Congressman Pepper, Chairman of the House Committee on Aging and a member of the Conference Committee on the 1978 amendments to the ADEA. Congressman Pepper stated:

> Those who participated in the House and Senate debates [on the amendment] would be surprised to

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usual employer-employee relationship. The jury may be more neutral in such circumstances.

* * * *

It seems to me to be wise to insure that particular protection to those who are subject to age discrimination.

123 CONG. REC. S17297 (daily ed. Oct. 19, 1977).

[7] H.R. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14 (1978).

[8] *Id.*; *see* note 5 *supra*.

> learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial. Under any legislative enactment in the field of civil rights, the Federal Government should be the leader not a grudging participant. * * * As chairman of the Committee on Aging, I will continue to watch developments in this area, and will ask for further delineation of the right of Federal employees to a jury trial if conflicting judicial interpretations are not resolved in favor of a jury trial.

125 CONG. REC. E4258 (daily ed. Sept. 9, 1979).

IV

The issue presented by this case is whether an employee who brings an ADEA action against the federal government may demand a jury trial for her suit. We agree with the District Court that a congressional intention to confer a right to jury trial in such cases may be inferred from the language and legislative history of the ADEA.

Accordingly, the judgment of the District Court is

Affirmed.

TAMM, *Circuit Judge, dissenting*: The majority infers from several legislative actions a congressional intent to give federal plaintiffs a jury trial in ADEA actions. I believe this intent is anything but clear. I therefore respectfully dissent.

I.

The seventh amendment states that "in Suits at common law, . . . the right of trial by jury shall be preserved . . . ." This provision of the Bill of Rights guarantees a jury trial for private parties in most federal civil actions. *See, e.g., Ross v. Bernhard*, 396 U.S. 531 (1970). By its very terms, however, the amendment does not apply to all cases but only to those arising under common law; thus actions in equity or admiralty are tried to a judge. At common law, a suit could not be maintained against the government due to its sovereign immunity; therefore, any action in which the government waives its immunity is not a suit at common law within the meaning of the amendment. *Galloway v. United States*, 319 U.S. 372, 388-89 (1943).

As the Supreme Court has stated, "It long has been established . . . that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Thus, when the government does consent to be sued, "there is a right to a jury trial . . . only if a statute, expressly or by fair implication so provides." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2314, at 69 (1971) (footnote omitted). *See also* 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[2], at 236 (2d ed. rev. 1971). In actions against the government under the ADEA, then, we must examine the Act's legislative history to see if Congress, in waiving sovereign immunity

to permit an ADEA action, intended also to submit the government to jury trials.

II.

Congress passed the ADEA in 1967 "to promote the employment of older workers based on their ability . . . through an education and information program to assist employers and employees in meeting employment problems . . . and through the utilization of informal and formal remedial procedures." H.R. REP. No. 805, 90th Cong., 1st Sess. 1, *reprinted in* [1967] U.S. CONG. CODE & AD. NEWS 2213, 2214. For the most part, Congress applied the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1976), to the ADEA: "the powers, remedies, and procedures provided in section 211(b), 216 (except for subsection (a) thereof), and 217 of [title 29]" govern violations of the ADEA. *Id.* § 626(b) (1976). These provisions permit private actions by aggrieved employees "for such legal and equitable relief as will effectuate the purposes of [the ADEA]," 29 U.S.C.A. § 626(c)(1) (West Supp. 1979). The Secretary of Labor may also bring suits to halt discriminatory practices, 29 U.S.C. § 626(b) (1976).

As originally passed, the ADEA specifically excluded federal employees from coverage.[1] *See* ADEA, Pub. L. No. 90-202, § 11, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 630(b) (1976)). In 1974, Congress amended the ADEA,[2] adding a new provision to deal specifically

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[1] The FLSA originally excluded all public employees from coverage. *See* FLSA, ch. 676, § 3(d), 52 Stat. 1060 (1938) (amended 1974).

[2] Congress also redefined "employer" in the FLSA to include "public agencies," thus extending the FLSA to cover all federal, state, and local governmental units. *See* 1974

with age discrimination against federal employees. *See* Fair Labor Standards Amendments of 1974 (1974 FLSA Amendments), Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 55 (1974) (codified at 29 U.S.C. § 633a (1976)).[3] It

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FLSA Amendments, § 6(a)(1), (6) (codified at 29 U.S.C. § 203(d), (x) (1976).

Passage of the Fair Labor Standards Amendments of 1974 capped a three-year effort to raise the minimum wage and to increase the coverage of the FLSA and ADEA. The original bill, S. 1861, 92d Cong., 2d Sess., 118 CONG. REC. 23952 (1972), did not contain provisions extending the ADEA to federal workers. During consideration of this bill, Senator Lloyd Bentsen introduced an amendment to include federal and state workers under the ADEA. The Senate Committee on Labor and Public Welfare adopted the amendment and included it in the bill sent to the Senate floor. *See* S. REP. No. 842, 92d Cong., 2d Sess. 45 (1972). The bill passed the Senate but died when the House refused to meet in conference to resolve differences over the minimum wage provisions of its bill. In 1973 the Senate again passed a bill, S. 1861, 93d Cong., 1st Sess., 119 CONG. REC. 24335 (1973), to increase the minimum wage and to extend the provisions of the ADEA and FLSA to federal employees. House conferees insisted, however, on deleting the ADEA amendments as not germane. H.R. REP. No. 413, 93d Cong., 1st Sess. 33 (1973) (conference report); 120 CONG. REC. 4706 (1974) (statement of Sen. Frank Church). The President vetoed the bill as inflationary. Finally, after extensive debate, in 1974 Congress passed and the President signed the 1974 FLSA Amendments.

[3] This section states in part:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Govern-

ment having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

[Continued]

authorizes the Civil Service Commission [4] to enforce the ban on age discrimination through "appropriate remedies, including reinstatement or hiring of employees with or without backpay." 29 U.S.C. § 633a(b). In addition, any aggrieved federal employee "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." *Id.* § 633a(c).

The legislative history of the 1974 FLSA Amendments does not mention the issue of jury trials under section 633a. Most of the debate on the 1974 FLSA Amendments dealt with its minimum wage provisions. Comments on the ADEA involved the need to extend its protection to federal and state workers.[5] Indeed, the committee report on the 1974 FLSA Amendments made clear that the original exclusion of the federal government from coverage under the ADEA was inadvertent:

> The Committee recognizes that the omission of government workers from the Age Discrimination in Employment Act did not represent a conscious decision by the Congress to limit the ADEA to employment in the private sector. It reflects the fact, that in 1967, when ADEA was enacted, most government employees were outside the scope of the

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[3] [Continued]

> (c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

29 U.S.C. 633c (1976).

[4] The Equal Employment Opportunity Commission assumed the duty of enforcing the ADEA in 1978. *See* Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19807 (1978), *reprinted in* 5 U.S.C.A. app. (West Supp. 1979).

[5] *See, e.g.*, 119 CONG. REC. 24807 (1973) (remarks of Sen. Frank Church).

> FLSA[,] and the Wage Hour and Public Contracts Divisions of the Department of Labor, which enforces the Fair Labor Standards Act, were assigned responsibility for enforcing the Age Discrimination in Employment Act.

S. REP. No. 690, 93d Cong., 2d Sess. 55 (1974). *Accord*, S. REP. No. 300, 93d Cong., 1st Sess. 56 (1973); S. REP. No. 842, 92d Cong., 2d Sess. 45 (1972).

The history of the 1974 FLSA Amendments indicates that Congress wanted federal employees to have the same protections from age discrimination as their counterparts in the private sector. Giving the same protection, however, does not necessarily mean Congress intended to establish the same procedures for federal employees to enforce those protections. With jury trials, congressional waiver of immunity can occur only by express statement or by clear implication; as noted above, however, Congress did not discuss jury trials for federal employees when considering the 1974 FLSA Amendments. This silence, therefore, must be construed as demonstrating that Congress did not intend federal employees to have jury trials under the ADEA.

The establishment of a separate legislative scheme for federal workers under the ADEA, 29 U.S.C. § 633a, supports this conclusion that Congress did not intend federal workers to have jury trials.[6] Congress entrusted the su-

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[6] Senator Lloyd Bentsen introduced S. 3318, 92d Cong., 2d Sess., 118 CONG. REC. 7745 (1972), to extend the ADEA to federal employees. This separate bill would have amended the definition of employer in 29 U.S.C. § 630(b) to include the federal and state governments. Such an amendment would have placed the federal government in the same position as all other employers subject to the ADEA. Senator Bentsen, later that term, introduced his amendment to the FLSA Amendments bill. Rather than altering the definition of employer, this amendment established a separate section with special procedures for dealing with age discrimination in the

pervision of the age discrimination program in the federal government to the Civil Service Commission and not to the Department of Labor, the agency supervising the ADEA in the private sector. Congress authorized the Commission to promulgate rules and receive reports from government agencies detailing efforts to fight age discrimination. *Id.* § 633a(b)(1). The Commission established an administrative grievance procedure, *see* 5 C.F.R. § 713.501-.521 (1978), to resolve age discrimination complaints without judicial intervention. These administrative procedures are not available to private-sector employees and they demonstrate that, although Congress wanted to grant the same protection to both federal and private employees, it did not mandate the same remedial procedures.

By 1978, a conflict had developed in the federal courts of appeals over the right to a jury trial in ADEA actions by employees in the private sector.[7] To resolve this controversy, Senator Edward Kennedy introduced an amendment to the Age Discrimination in Employment Amendments of 1978 (1978 ADEA Amendments), Pub. L. No. 95-256, 92 Stat. 189 (codified in scattered sections of 29 U.S.C.A. (West Supp. 1979)), to ensure jury trials for private plaintiffs under section 626. *See* 123 CONG. REC. S17296-97 (daily ed. Oct. 19, 1977). While the legislation still was pending, the Supreme Court handed down

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government. The use of the separate provision for federal employees under the ADEA, rather than the simple change in the definition of employer under S. 3318, indicates that Congress contemplated different procedures for the two programs.

[7] *Compare* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977) (right to jury trial), *cert denied*, 434 U.S. 1022 (1978), *and* Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977) (same), *aff'd*, 434 U.S. 575 (1978), *with* Morelock v. NCR Corp., 546 F.2d 682 (6th Cir. 1976) (no right to jury trial), *vacated and remanded*, 435 U.S. 911 (1978).

its decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), which held in a private-sector case that Congress indeed had intended plaintiffs to have jury trials in ADEA actions to recover lost wages. House and Senate conferees nevertheless incorporated the jury trial provision in the final version of the 1978 ADEA Amendments and clarified an issue left unresolved in *Lorillard* by granting private-sector employees a right to jury trials when liquidated damages were involved. H.R. REP. NO. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 528, 535. *See* 1978 ADEA Amendments § 4(a) (codified at 29 U.S.C.A. § 626(c)(2) (West Supp. 1979)).

Despite its reexamination of the jury trial provisions, Congress did not amend section 633a, the corresponding section giving federal workers the right to bring civil actions for age discrimination against the United States. As the Fifth Circuit has noted in a related context, "Where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded." *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 948 (1973). *See also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976). The failure to adopt a parallel amendment indicates that Congress did not intend to extend its waiver of sovereign immunity to permit jury trials for federal employees.[8]

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[8] The failure to amend § 633a cannot be deemed inadvertent. The Kennedy amendment, though adopted on the Senate floor with little debate, received careful consideration in the conference committee, which altered it to clarify the right to jury trial when liquidated damages were involved. *See* H.R. REP. NO. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 536. The conference committee also altered § 633a, amending subsection (a) and adding subsections (f) and (g) to authorize studies of age discrimination. *Id.* In amending both sections as it did,

III.

Appellees also argue, and the majority agrees, that *Lorillard v. Pons* supports a right to jury trial for federal plaintiffs under the ADEA. This reliance is misplaced. *Lorillard* arose in the private sector and involved section 626, which adopts FLSA remedies. *See* p. 3 *supra*. The Court concluded that Congress intended plaintiffs under section 626—by definition, employees in the private sector only[9]—to have the same rights as plaintiffs under the FLSA, who may insist on jury trials.[10] At no time did the Court discuss federal employees, section 633a, or congressional waiver of sovereign immunity. This right to demand a jury trial does not extend to federal employees suing under section 633a, for the waiver of sovereign immunity to allow jury trials for federal plaintiffs presents different concerns. Juries may be too sympathetic toward plaintiffs in cases where the federal government is the defendant. Congress has noted this problem when considering bills authorizing jury trials against the government: "The primary objection to granting jury trials in suits against the United States is that juries, in considering possible sums to be awarded the plaintiff, might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict." H.R. REP. NO. 659, 83d Cong., 2d Sess. 3 *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 2716, 2718 (amending 28 U.S.C. § 2402 to allow jury trials in suits by taxpayers for tax refunds from the federal gov-

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Congress could not have overlooked the need to amend § 633a(c) to allow jury trials for government employees if it had so wished.

[9] *See* 29 U.S.C. § 630(b) (1976) (excluding the federal government from ADEA's definition of employer).

[10] *See, e.g.*, Lewis v. Times Publishing Co., 185 F.2d 457 (5th Cir. 1950).

ernment). Trying a case to a judge removes this potential bias.

The majority further observes that the Court in *Lorillard* based its decision in part on the presence of the term "legal . . . relief" in section 626(b), which the Court believed suggested a congressional desire for jury trials. *See* 434 U.S. at 585. The majority contends that the appearance of "legal . . . relief" in section 633a(c)(1) similarly supports a jury trial for federal employees. The *Lorillard* Court, however, based its findings of congressional intent on the meaning of the term under the seventh amendment.[11] As noted above, the seventh amendment does not apply in this case, for common-law or "legal" remedies cannot lie against the federal government. *See* pp. 1-2 *supra*. Thus, reliance on Congress's use of "legal . . . relief" in section 633a would be inappropriate because of the term's relationship to the seventh amendment.

Reliance on *United States v. Pfitsch*, 254 U.S. 547 (1921), is equally unavailing. *Pfitsch* involved "the nature of the jurisdiction conferred upon the District Court by § 10 of the Lever Act [c. 53, 40 Stat. 276 (1917)]," *id.* at 549, a wartime measure authorizing seizure of supplies for the American effort in World War I. The Court, after examining the legislative history of the Lever Act, concluded that Congress had intended district courts to have sole jurisdiction under section 19 rather than concurrent jurisdiction with the Court of Claims. Given this exclusive jurisdiction, an appeal from the district court should have gone to the Circuit Court of Appeals rather than the Supreme Court on direct writ of error. The Court therefore dismissed the appeal for want of jurisdiction.

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[11] The Court stated: "In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial." 434 U.S. at 583.

In its decision, the Court in dictum indicated that exclusive jurisdiction in the district court under the Lever Act would include "incidentally" a right to jury trial against the federal government. *Id.* at 550. The Court mentioned jury trials only in reaching its conclusion about the type of jurisdiction Congress had conferred. It neither discussed nor decided a plaintiff's right to jury trial per se. These few comments on the right to a jury trial under the Lever Act do not mean that Congress waives the government's immunity to jury trial anytime it confers sole jurisdiction on the district courts. The "fair implication" of the right to jury trial as found in *Pfitsch*, 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2314, at 69 & n.43 (1971), *quoted* at p. 2 *supra*, cannot be drawn in this case, for Congress established a separate enforcement scheme for federal employees under the ADEA and then failed to alter that scheme to allow jury trials for federal plaintiffs when it provided that right to private-sector employees in 1978.[12]

IV.

Sovereign immunity, though criticized, remains a viable doctrine. *See, e.g., Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977) (Bazelon, C.J.). Jury trials, though favored, are not always permitted.[13] This favor does not extend to suits against the government. "[W]hile statesmen and jurists are often wont to extol the virtues of jury trial, they are

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[12] In addition, *Pfitsch* supplies the sole support for the assertions made in 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2314, and 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[2], that jurisdiction in the United States District Court against the federal government carries with it the right to jury trial.

[13] *Cf.* 28 U.S.C. § 2402 (1976) (any action brought under Federal Tort Claims Act will be tried to the court without jury).

not accustomed to extend the virtues to actions against the United States, either in the Court of Claims or in the district courts." 5 MOORE'S FEDERAL PRACTICE, ¶ 38.31 [2], at 234-35 (footnotes omitted). Congress has had ample opportunity to afford federal employees the right to jury trial under the ADEA but has failed to do so. We should not apply what it has so far denied.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0867

ALICE NAKSHIAN, PLAINTIFF

v.

W. GRAHAM CLAYTOR, JR., DEFENDANT

MEMORANDUM

Plaintiff is an older woman who has been employed as a secretary and clerk by the Navy Department for over thirty years. She has sued the Navy for alleged age discrimination under the Age Discrimination in Employment Act (ADEA). Plaintiff requests a jury trial for her suit, and defendant has moved to strike the request. The court must now determine whether plaintiff has a right to a jury trial under the ADEA in a suit against the government.[1]

I. RIGHT TO JURY TRIAL IN PRIVATE ADEA SUITS

The Supreme Court recently established that plaintiffs have the right to demand a jury trial for ADEA suits brought against private employers (hereinafter, "private ADEA suits"). *Lorillard v. Pons*, ___ U.S. ___, 98 S.Ct.

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[1]This question is one of first impression. Although the government conceded the right to a jury trial in an ADEA suit against the Department of Labor, *Carter v. Marshall*, C.A. No. 77-365 (D.D.C. 1978), the government apparently has adopted the policy of no longer conceding the issue.

866 (1978). The Court based its conclusion on statutory grounds. It determined that Congress intended to grant plaintiffs a jury right when it enacted 29 U.S.C. § 626(c). The Supreme Court noted that the ADEA's enforcement provisions were modeled after those of the Fair Labor Standards Act (FLSA). Because the FLSA established the right to a trial by jury in private actions, the Court inferred that Congress likewise intended the ADEA to provide such a jury right. The Supreme Court also pointed out that the ADEA empowers a court to grant "*legal* or equitable relief" [29 U.S.C. § 626(c)] (emphasis added). The explicit use of the term of art, "legal . . . relief" manifests Congress' intention to provide a jury trial right, according to the Court. *Id.* at 871–72.

Congress codified the *Lorillard* result by explicitly amending the ADEA to grant plaintiff a jury trial right in private ADEA suits. § 7(c) of the ADEA was amended, in 1978, to include the following paragraph:

> (2) In an [ADEA] action . . . a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

See Act of April 6, 1978, Pub. L. No. 95–256, 92 Stat. 189 (1978).

II. RIGHT TO JURY TRIAL IN ADEA SUITS AGAINST THE GOVERNMENT

When originally enacted, the ADEA did not establish the right of persons to sue the federal government for age discrimination. Congress' 1974 amendments to the Act, however, established such a right. In doing so, Congress used the exact same language that it had previously employed to authorize private ADEA suits:

> Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for any such legal or equitable relief as will effectuate the purposes of this chapter.

Compare 29 U.S.C. § 633a(c) *with* 29 U.S.C. § 626(c).

The question now before the court is whether the above quoted language gives plaintiffs a right to demand a jury trial in ADEA suits brought against the federal government.

Application of the *Lorillard* Court's reasoning suggests that a jury trial right exists for suits brought against the government. First, § 633a(c) uses the same "legal . . . relief" language that persuaded the Supreme Court to conclude that § 633a(c)'s companion provision, § 626(c), permits jury trials for private ADEA suits. Second, Congress' 1974 amendments to the Act made the ADEA generally applicable to the federal government, with few changes.[2] Indeed, the use of the exact same language in § 633a(c) as in § 626(c) indicates that Congress intended suits against the government to be on equal footing with private ADEA suits. Thus, an implied jury right for private ADEA actions is equally applicable for government ADEA suits. Third, if Congress had indended its consent to ADEA suits to be limited to non-jury trials, it could have easily said as much. Congress' failure to assert continuing sovereign immunity with respect to ADEA *jury* trials implies its abandonment of that immunity. At the least, this court is unwilling to deprive plaintiffs who sue government entities instead of private employers of their right to

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[2]The drafters of the 1974 amendments did not intend to alter substantially the ADEA enforcement scheme for suits against the government. Instead, Congress indicated that it simply meant to "expand the coverage of the Act to Federal, State, and local employees." H.R. Rep. No. 93-913, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 2811, 2860.

a jury trial without Congress' explicit refusal to grant such a right.

The 1978 amendments to the ADEA have introduced some confusion into this otherwise clear conclusion that plaintiffs have the right to a jury trial in ADEA suits against the government. As mentioned above, those amendments included an express addition to 29 U.S.C. § 626(c) [§ 7(c) of the ADEA] which codified *Lorillard's* holding that private ADEA litigants have the right to demand a jury trial. Congress did not, however, similarly amend § 626(c)'s companion provision for suits against the government, § 633a(c). The United States therefore argues that Congress did not intend to allow jury trials for ADEA suits against the government.

At first blush, the United States' position seems persuasive. Congress' failure to amend § 633a(c) to explicitly allow jury trials for government ADEA suits arguably indicates that it did not want to "extend" the jury trial right to those suits. This argument fails, however, for three reasons. First, the legislative history, though vague, indicates that Congress did not intend its explicit authorization of ADEA jury trial to apply only to private ADEA suits, and not those lodged against the government. The history speaks only in general terms about the right of a jury trial for ADEA suits.[3] It does not reflect a conscious decision by Congress to limit *Lorillard* to private ADEA suits. Second, the clear, unamended language of § 633a(c) compels a conclusion that plaintiffs have a jury trial right in government ADEA suits. Specifically, § 633a(c) speaks in terms of "legal . . . relief." As noted by the Lorillard Court:

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[3]H. Conf. Rep. 95-950, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News at 1007.

> The word "legal" is a term of art: In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial. 98 S.Ct. at 871.

Third, Congress' silence should not be interpreted to deprive plaintiffs of the cherished right to a jury trial. As mentioned above with reference to the 1974 ADEA amendments, and as demonstrated by the *Lorillard* Court, the failure to explicitly provide for jury trials does not compel the conclusion that such trials are not permitted on grounds of sovereign immunity or statutory interpretation. To so hold would ignore the spirit of the 1978 amendments to the ADEA, the language of § 633a(c), and the importance of the right to a trial by jury.

The court therefore concludes that Congress intended to permit plaintiffs suing the government under the ADEA to demand jury trials.[4]

So ordered.

/s/ _____
LOUIS F. OBERDORFER
United States District Judge

Date: MARCH 7, 1979

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[4]Because the case can be disposed of on statutory grounds, the court does not find it necessary to determine whether plaintiff might have a Seventh Amendment right to a jury trial in this case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78–0867

ALICE NAKSHIAN, PLAINTIFF,

v.

W. GRAHAM CLAYTOR, JR., DEFENDANT.

ORDER

In accordance with the Memorandum filed this day by the court, it is this 8th day of March, hereby

ORDERED: That defendant's motion to strike plaintiff's demand for a jury trial be, and is hereby, DENIED.

/s/ _____
LOUIS F. OBERDORFER
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0867

ALICE NAKSHIAN, PLAINTIFF,

v.

W. GRAHAM CLAYTOR, DEFENDANT.

SUPPLEMENTAL MEMORANDUM

On March 7, 1979, the court entered a Memorandum and Order that denied defendant's motion to strike plaintiff's jury demand. On that same date, defendant filed an additional memorandum vigorously opposing plaintiff's request for a jury trial in this Age Discrimination suit.

Defendant chooses to emphasize two arguments in its latest papers. First, it contends that the Supreme Court's reasoning in *Lorillard v. Pons*, ___ U.S. ___, 98 S.Ct. 866 (1970) does not support a finding of a jury trial in ADEA suits against the government. Second, defendant repeats its earlier arguments that Congress has not waived sovereign immunity for purposes of jury trials against the government.

Applicability of the FLSA. Defendant asserts that the *Lorillard* Court based its finding of a jury trial right for ADEA suits against private employers on the similar right existing under the Fair Labor and Standards Act ("FLSA"). It now argues that the FLSA does not allow jury trials for suits against the government, and thus the ADEA similarly is not meant to permit jury trials for such suits.

Defendant's reasoning contains two fallacies. First, the *Lorillard* Court did not depend solely on the FLSA to hold that a similar right adheres for the ADEA. Indeed, the Court emphasized that the language of the ADEA, calling for "legal . . . relief," demonstrates an intent to create a jury trial right. Second, it was not until 1974 that Congress extended the ADEA to suits against the government. The FLSA may have been useful as a guide in divining Congress' 1967 intentions when it enacted 1974 amendments. A much more reliable guide, in the opinion of the court, is the language of the 1974 amendments which provides for "legal . . . relief" against the government.

Sovereign Immunity. Defendant repeats its argument that because the United States has not explicitly permitted jury trials in ADEA suits, no jury trial right exists.

The defendant is correct, of course, in asserting that the doctrine of sovereign immunity generally bars suits against the United States without its consent. *McElrath v. United States*, 102 U.S. 426 (1880). The United States also can dictate, to some extent, the terms of suit. *Id.* The defendant goes too far however, when it asserts that unless Congress explicitly allows jury trials in suits against it, such trials necessarily are barred. The courts obviously can, and have, inferred a Congressional intention to allow jury trials in the absence of explicit authorization. *See, e.g., Lorillard v. Pons, supra; United States v. Pfitsch*, 256 U.S. 547 (1921). Indeed, courts should not be reluctant to find the right to a jury trial in suits against the United States. Once the government has consented to suit, its silence or ambiguity about whether plaintiffs can demand a jury trial should not be grounds for the denial of such trials. Courts have a responsibility to take a close look at

Congressional intent and, if necessary, at the Constitutional right to a jury trial, before they hold that plaintiffs are not entitled to trials by a jury of their peers. The doctrine of sovereign immunity does not absolve them from this responsibility.

/s/ _____
LOUIS F. OBERDORFER
United States District Court

MARCH 15, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

Civil Action No. 78-0867

No. 79-1672

ALICE NAKSHIAN

v.

W. GRAHAM CLAYTOR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia.

BEFORE: WRIGHT, Chief Judge; BAZELON, Senior Circuit Judge, and TAMM, Circuit Judge

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion of this Court filed herein this date.

Per Curiam

For the Court

/s/ _____

GEORGE A. FISHER
Clerk

Dated: FEBRUARY 19, 1980
Opinion for the Court filed by Chief Judge Wright.
Dissenting opinion filed by Circuit Judge Tamm.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

Civil Action No. 78-0867

No. 79-1672

ALICE NAKSHIAN

v.

W. GRAHAM CLAYTOR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY, ET AL., APPELLANTS

BEFORE: WRIGHT, Chief Judge; BAZELON, Senior Circuit Judge; and TAMM, Circuit Judge

ORDER

Upon consideration of appellants' (federal) petition for rehearing, it is

ORDERED, by the Court, that appellants' aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

/s/ _____

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

Civil Action No. 78-0867

No. 79-1672

ALICE NAKSHIAN

v.

W. GRAHAM CLAYTOR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY, ET AL., APPELLANTS

BEFORE: WRIGHT, Chief Judge; McGOWAN, TAMM, ROBINSON, MacKINNON, ROBB, WILKEY, WALD, MIKVA, and EDWARDS, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellants' (federal) having been transmitted to the full Court and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For The Court:

/s/ _____

GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would grant appellants' suggestion for rehearing *en banc*.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Section 7 of the Age Discrimination in Employment Act, 29 U.S.C. 626, provides in pertinent part:

> (b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Section 15 of the Age Discrimination in Employment Act, 29 U.S.C. 633a, provides:

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Opportunity Employment Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Opportunity Employment Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Opportunity Employment Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Opportunity Employment Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of

discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions of personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.